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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB. P. 33/2014

AVINASH EM PROJECTS PVT. LTD.

..... Petitioner

Through: Mr. Sanjiv Kakra, Ms. Vaishali Kakra
and Mr. Varus Gowda, Advocates

versus

GAIL (INDIA) LIMITED

..... Respondent

Through: Mr. Parag Tripathi, Sr. Advocate with
Mr. Pragyan Sharma, Ms. Kanika Tandon and
Mr. Nitikesh Kumar, Advocates

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

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10.11.2014

IA No.21785/2014 (Exemption)

1. Allowed subject to just exceptions.

ARB. P. 33/2014 and IA No.21786/2014 (stay)

2. This is an appeal preferred against the order dated 07.11.2014, passed by the learned arbitrator. By this order, the appellant's petition under Section 17 of the Arbitration and Conciliation Act, 1996 (in short the Act) has been dismissed. The appellant being aggrieved, has preferred the captioned appeal.

3. Briefly, the case of the appellant is that, the bank guarantees in issue, the details of which are set out at pages 443 to 446 of the documents file, pertain to three contracts, each of which has worked itself out. It is, therefore, the appellant's case that the contracts having been duly performed, the bank guarantees cannot be invoked, and thus, encashed by

the respondent herein.

3.1 At the very outset, Mr. Kakra, who appears for the appellant has clearly admitted that the principle of fraudulent invocation is not set into play in this case. It is the appellant's case that injunction qua encashment of the bank guarantees in issue was sought on the ground of special equities, and therefore, in the given circumstances, the learned arbitrator ought not to have passed the impugned order having regard to the fact that the contracts in issue had been performed.

4. On the other hand, Mr. Tripathi, who appears for respondent no.1, on advance notice, has resisted, the admission of the appeal. Mr. Tripathi has submitted that the appellant in this case has clearly given up its right to challenge the termination of the contracts in issue, in another proceedings, that is, WP (C) 465/2014; instituted in this court. For this purpose, he has referred to order dated 21.01.2014, passed by the learned Single Judge of this court. It is Mr. Tripathi's submission that if, that be the case, surely there can be no ground for seeking injunction qua the bank guarantees in issue.

4.1 Furthermore, Mr. Tripathi has also contended that the appellant was guilty of fudging the balance sheet filed, at the time when it had bid for the concerned contract(s). It is stated that the balance sheet in issue pertains to the financial year 2010-2011, and that, the fudged balance sheet was filed with the bid on 06.09.2010. Mr. Tripathi says that the appellant had prepared two different sets of accounts for the same financial year. The first set was prepared by a Chartered Accountant by the name of Mr. Vishal Aggarwal, who infact curiously replaced the statutory auditor, one, Mr. Neeraj Garg. The balance sheet which bore the signatures of Mr. Vishal

Aggarwal, was dated 21.08.2010, whereas the one, which was signed by the statutory auditor, Mr. Neeraj Garg, was dated 31.08.2010.

4.2 Mr. Tripathi has submitted that what makes the conduct of the appellant worse, is the fact that even though the balance sheet prepared by the statutory auditor was available as on 31.08.2010, the appellant chose, not to file that balance sheet with its bid dated 06.09.2010, and instead, filed the earlier, fudged balance sheet dated 21.08.2010.

4.3 It is the stand of respondent no.1 that the fraud would not have got unravelled, had the petitioner's balance sheet (prepared by its statutory auditor) not got uploaded on the Registrar of Companies (R.O.C.)'s website. It is stated that it was only on a comparison of the two balance sheets, and that too by chance, that respondent no.1, discovered the fraud. The cooking up of the accounts, according to respondent no.1, was clearly deliberate and intended to secure the contracts in issue. Mr. Tripathi, thus, submitted that, in these circumstances, no indulgence ought to be granted to the appellant.

5. On the aspect of performance vis-a-vis the contracts in issue, it is Mr. Tripathi's case that at least two out of the three contracts were not completely performed and for this purpose, he referred me to the observations recorded by the learned arbitrator at page 13 (see para 13) of the impugned order.

5.1 Upon, Mr. Tripathi, being queried as to how the learned arbitrator, in paragraph 39, at page 40 of the impugned order, had recorded that respondent no.1 did not dispute that there was no defect in performance or in the execution of the work by the appellant (i.e., the original claimant), with regard to the three contracts; it is his say that there is obviously an

error in the learned arbitrator's reaching such a conclusion which is apparent from the submissions recorded earlier in paragraph 13, at page 13 of the impugned order. Mr. Tripathi though, does not contest the fact that appreciation letters dated 03.11.2011 and 30.10.2012, were issued to the appellant.

5.2 Apart from the above, it is Mr. Tripathi's contention that there are no averments in the application filed under Section 9 of the Act (which was later converted into an application under Section 17 of the Act), pertaining to fraud or special equities.

6. As indicated above, Mr. Kakra has conceded that his case does not pertain to fraudulent invocation, and that, the appellant is confining its submissions, in the instant case, to one of special equities.

7. I have heard the learned counsel for the parties. The broad facts, which are necessary for adjudication of the present appeal, are as follows :-

7.1 Between August 2010 and September 2011, pursuant to tenders floated by respondent no.1, three contracts were executed inter se the parties herein. The two contracts pertained to annual rate contracts for construction of pipelines and associated facilities, to enable supply of gas to new and existing consumers. These contracts were numbered as : 8000002119 (in short E-tender 2119) and 8000003564 (E-tender 3564).

7.2 The third contract, which was numbered as : 8000002161 (in short E-tender 2161) was, in fact, entered into prior in point of time and pertained to execution of work involving, inter alia, laying, testing, commissioning of various spurlines and augmentation of existing pipelines in the Vijaipur-Kota Sector.

7.3 There is no dispute that the appellant was entrusted with the job of

executing the aforementioned contracts. The controversy, really revolves around respondent no.1's right to encash the bank guarantees in issue, which were furnished in consonance with the terms and conditions of the contract.

7.4 A perusal of the award would show that, respondent no.1 before the arbitral tribunal took the following stand with regard to the extent of work completed vis-a-vis each of the aforementioned contracts. In so far as E-tender 2161 was concerned, it was stated that 60-70% of the work was completed. As regards, E-tender 3564, it was stated that 90% of the work was completed. However, with respect to E-tender 2119, it was conveyed that 100% of the work, was completed.

7.5 There is also no dispute about the fact that upon the alleged fraud being unravelled, a show cause notice dated 29.07.2013, was issued by respondent no.1 to the appellant herein. To this show cause notice, a reply was filed, pursuant to which, respondent no.1, passed a black-listing order dated 16.01.2014. It was this order which was assailed by the appellant, in WP (C) 465/2014. As indicated above, the said blacklisting order was set aside, giving liberty to respondent no.1, to pass a fresh order, and in passing the order, it was directed to consider all documents, which had been placed on record by the appellant in that proceeding. Respondent no.1 was, also directed, to give the appellant due opportunity in that behalf.

7.6 What is required to be noticed, is that, while passing the order dated 21.01.2014, the learned single judge had indicated that the cancellation of the three contracts referred to above, shall not be open to challenge by the appellant, and that, any monetary dispute with regard to the said contracts could be raised by the appellant, in any appropriate forum, in accordance

with law. The rights and contentions of the parties were, however, left open by the court.

7.7 In the interregnum, it appears that a series of letters of invocation of even date i.e., 18.01.2014 were issued by respondent no.1. By these letters of invocation, respondent no.1 sought to trigger the process of encashment of the bank guarantees in issue. It is this action, which led the appellant to institute OMP 83/2014, under Section 9 of the Act.

7.8 By order dated 20.01.2014, an interim order was passed in favour of the appellant, injuncting thereby, respondent no.1 from encashing the bank guarantees in issue subject to the condition that they would be kept alive.

7.9 There is no dispute, that an arbitral tribunal was constituted by the parties herein, in consonance with the terms of the contract. The court having been apprised of the same, on 07.07.2014, disposed of OMP 83/2014, with a direction that the petition under Section 9 of the Act be treated by the learned arbitrator, as an application filed under Section 17 of the Act. The learned arbitrator was requested to dispose of the said application, at the earliest, preferably within the next 30 days. It was directed though that in the interregnum, the interim injunction granted on 20.01.2014, would continue to operate.

8. It is, in this background, that the learned arbitrator, has passed the impugned order.

9. Having considered the matter, what emerges from the record, is that, the learned arbitrator has come to a prima facie conclusion, at least in so far as the purported fraud is concerned, that the allegation, has some substance. As a matter of fact, the learned arbitrator has gone to the extent of saying that misrepresentation employed by the appellant has affected the “due

performance” of the contracts in issue. The relevant observations made by the learned arbitrator, in this behalf, are culled out hereinbelow : -

“..The claimant prima facie seems to have procured the contract work on the strength of fudged documents and therefore the various acts of commission and omission on the part of the claimant squarely bring its case in the category of breach in terms of contract contemplated in the tender documents, particularly those referred hereto above. This arbitral tribunal is of the view that performance of a contract procured through misrepresentation on vital aspects does not qualify for ‘due-performance’..”.

(emphasis supplied)

10. Apart from the above, the learned arbitrator has also come to the conclusion that the encashment of the bank guarantees in issue by the respondent is towards recovery of liquidated damages (which are equivalent in value to the amount of the bank guarantees in issue), as contemplated under clause 4(2) of the Integrity Pact executed between the parties herein. Thus in sum, the learned arbitrator declined to continue with the injunction, on the encashment of the bank guarantees in issue, as according to him, the allegation made by respondent no.1 that the appellant had indulged in corrupt and fraudulent practices, had prima facie, the right resonance.

11. Mr. Kakra, the learned counsel for the appellant though, has sought to argue that notwithstanding the fact that such an allegation has been levelled against the appellant, at this stage, it would have no relevance, as the issue, is yet to be adjudicated upon. According to Mr. Kakra, the learned arbitrator ought to have continued with the interim order passed by this court, in view of the fact that the bank guarantees in issue being a separate and independent contract, the legal validity of their invocation

could not have been made dependent upon the accusation levelled against the appellant.

11.1 Mr. Kakra submitted that, once, the learned arbitrator had found that respondent no.1, had taken a stand that the contracts in issue had been performed, the injunction should have followed as a matter of course, and therefore, there was no good reason to vacate the injunction in view of the fact that the matter was under adjudication.

11.2 Furthermore, it is Mr. Kakra's submission that neither clause 4.2 of the Integrity Pact nor clause 29.1 of the contracts in issue had any relevance and / or applicability to the point in issue.

11.3 This apart, Mr. Kakra also assailed the observation made in the impugned order to the effect that an application under Section 17 of the Act does not lie against an entity such as the bank which issued the bank guarantees as it is not a party to the arbitration agreement. Learned counsel submitted that injunction could have been granted instead against the respondent herein.

12. In my opinion, apart from anything else, in matters of grant of interim injunction, the court, exercises an equitable jurisdiction, and that, jurisdiction extends not only to orders generally passed for interim injunctions but also vis-a-vis those pertaining to bank guarantees. In so far as bank guarantees are concerned, the width and amplitude of power available to the court is narrower. Ordinarily, encashment of an unconditional bank guarantee is not enjoined by a court. In order to obtain an order of injunction, the aggrieved party is required to demonstrate that it is either a case of fraudulent invocation or, one of special equities or in a given case, covered by both exceptions.

12.1 As indicated above, the appellant has taken a stand that it does not plead fraud. Whether the circumstances articulated by the appellant fall within the exception of special equities is, the only aspect, that I need to examine in this case.

12.2 The circumstances set forth by the appellant would not, in my view, place the instant matter in the category of special equities as this is not case where irretrievable injustice would be caused to the appellant, in the event of the bank guarantees in issue are encashed. Respondent no.1, is a public sector undertaking, which is good for its money and, in case the appellant, were to finally succeed, the money so paid by it can be easily retrieved. This apart, as indicted above, in this particular case, the prima facie finding returned by the learned arbitrator, that the appellant had indulged in corrupt practices, persuades me, to decline, the appellant's request for staying the impugned order.

12.3 I had put to Mr. Kakra, as to whether the two balance sheets, to which reference was made by Mr. Tripathi had infact been prepared and brought into play. I had specifically, put to Mr. Kakra, as to whether the balance sheet prepared by Mr. Vishal Aggarwal, was used at the stage of filing the bid, with the respondent. Mr. Kakra, did not deny this aspect of the matter, though, he tried to portray that the balance sheet prepared by Mr. Vishal Aggarwal contained a clerical error. In my view, prima facie, this cannot be a clerical error for the reason, on being queried further, Mr. Kakra, accepted the fact that the eligibility criteria for a bidder to enter the fray was that it should have the working capital of at least Rs.4.85 Crores. Mr. Kakra conceded that the balance sheet authenticated by the statutory auditor did not reflect that figure, while the balance sheet prepared, on the

other hand, by Mr. Vishal Aggarwal, did reflect the appellant's working capital, at a figure much higher than that required for fulfilling the eligibility criteria. What made matters worse is the fact, that though the audited balance sheet prepared by Mr. Neeraj Garg was available, it was not filed at the time of filing of the bid. The bid was accompanied by an inaccurate balance sheet prepared at an earlier point in time. As indicated above, none of these facts were refuted by Mr. Kakra. Therefore, prima facie, in my opinion, a fraud was perpetrated by the appellant. Whether or not it will finally impact the claims which the appellant has preferred, is a matter, which is pending adjudication before the learned arbitrator. This aspect, therefore, firms up my resolve to decline any relief in the appeal.

13. In any case, in matters of appeal, the ground available to the appellate court for interference, that too, qua interim orders would be limited to perversity or to a case where the view taken in the order-in-original is one which no reasonable or prudent person could have taken, having regard to the provisions of the contract or the state of the law. I do not find that the view taken by the learned arbitrator in the facts and circumstances of the case is either perverse or unreasonable. (See *Wander Ltd. and Anr. Vs. Antox India P. Ltd., 1990 (Supp) SCC 727*).

13.1 Before I conclude though I must state that Mr. Kakra was right in his submission that an injunction under Section 17 of the Act could have been granted by the learned arbitrator against the respondent herein if not qua the concerned bank. Injunction is an order which acts in personam. The arbitrator, if otherwise inclined, could have granted an injunction vis-a-vis the respondent. Having said so, this will not help the cause of the appellant for the reasons recorded above.

14. The appeal and the pending application are, accordingly, dismissed. Needless to say, any observations made hereinabove will not affect the merits of the case pending adjudication before the arbitral tribunal.

RAJIV SHAKDHER, J

NOVEMBER 10, 2014

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